IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM MONROE HARGRAVE, Appellant.	No. 32649-3-II UNPUBLISHED OPINION

ARMSTRONG, J. -- William Monroe Hargrave appeals his sentence following an unlawful possession of a firearm conviction. He argues that the court incorrectly included two California grand theft convictions in calculating his offender score. Specifically, he maintains that our decision in his previous appeal establishes the law of the case and precludes the State from again asking the sentencing court to include the California convictions. Hargrave also claims that his trial counsel rendered ineffective assistance, that the prosecutor committed prejudicial misconduct, and that the court erred by including his community placement status in calculating his offender score. Finding no error, we affirm.

FACTS

A jury convicted William Monroe Hargrave of first degree unlawful possession of a firearm and of violating the Uniform Controlled Substances Act (UCSA). We bifurcated

Hargrave's original appeal into sentencing and substantive issues, resulting in two separately issued opinions.[1]

In *Hargrave I*,[2] we held that the State failed to prove that Hargrave's foreign convictions were comparable to Washington offenses. Thus, we concluded that the court erred by including the foreign crimes in calculating Hargrave's offender score, vacated the sentence, and remanded for resentencing with an offender score of 6 instead of 8.

In *Hargrave II*,[3] we rejected Hargrave's challenges to a jury instruction and the sufficiency of the evidence, but we held that the information was defective for failing to include an element of the firearm possession charge; accordingly, we affirmed the drug conviction but reversed and remanded the firearm charge for dismissal without prejudice.

The State refiled, by second amended information, the first degree unlawful possession of a firearm charge against Hargrave. A jury convicted Hargrave on this charge. In calculating Hargrave's offender score for the firearm possession sentence, the court included two points for two prior California convictions and one point for Hargrave's community placement status when he committed the crime. The sentencing court determined that Hargrave's offender score was 10. We will refer to this appeal as *Hargrave III*.

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[1] We will refer to Hargrave's first sentencing appeal as *Hargrave I* and the first substantive appeal as *Hargrave II*.

[2] *State v. Hargrave*, 2000 Wn. App. LEXIS 2738 (*Hargrave I*).

[3] *State v. Hargrave*, 2002 Wn. App. LEXIS 449 (*Hargrave II*).

ANALYSIS

I. Including California Offenses in Hargrave's Offender Score

Hargrave may challenge his offender score calculation for the first time on appeal. *In re Pers. Restraint of Call*, 144 Wn.2d 315, 331-32, 28 P.3d 709 (2001) (citing *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994)). We review a sentencing court's offender score calculations de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003) (citing *State v. McCraw*, 127 Wn.2d 281, 289, 898 P.2d 838 (1995)).

Hargrave contends that the trial court erred in including his California convictions because (1) the law of the case from *Hargrave I* precluded the State from again trying to prove the California convictions' comparability, and (2) the State failed in its second attempt to prove that the California convictions are comparable, and (3) the State had to prove the existence of the California convictions to a jury beyond a reasonable doubt rather than to the judge.

A. The Law of the Case Doctrine

The law of the case doctrine generally refers to the binding effect that appellate court decisions have on further proceedings in the trial court on remand or to the principle that an appellate court will generally not re-decide the same legal issues in a later appeal of the same case. *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (citing *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992)). The appellate court, however, has discretion as to whether to apply the doctrine. RAP 2.5(c)(2); *Folsom v. Spokane County*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988) (citing *Greene v. Rothschild*, 68 Wn.2d 1, 8, 402 P.2d 356, 414 P.2d 1013 (1965)).

Hargrave argues that the law of the case doctrine precluded the trial court from considering his California convictions in his

offender score because we previously held that the State failed to prove their comparability. We disagree. In *Hargrave I*, we held that the State failed to compare the elements between Hargrave's California offenses and comparable Washington offenses. Accordingly, we vacated Hargrave's sentence, remanded for resentencing, and ordered the trial court to exclude the California convictions when calculating his offender score.

But in *Hargrave II*, we then reversed Hargrave's conviction for first degree unlawful possession of a firearm and remanded for dismissal without prejudice. We did not remand *Hargrave II* for additional proceedings. Accordingly, when the State amended the information and charged Hargrave with unlawful possession of a firearm, it initiated a new case. Thus, the present appeal is not the same case as *Hargrave II*, even though it involves the same criminal conduct.

After *Hargrave II*'s dismissal without prejudice, the State had to recharge, retry, and reconvict Hargrave. And this (*Hargrave III*) is the first appeal in this cause number. *See Folsom*, 111 Wn.2d at 263 (the law of the case doctrine ordinarily precludes re-deciding the same legal issues in a subsequent appeal where there has already been a determination of the applicable law in a prior appeal). Since we have not ruled on whether the sentencing court can include the California convictions in this case, the law of the case does not apply. *See Harrison*, 148 Wn.2d at 562 (an appellate court will generally not make a redetermination of the rules of law that it has announced in a prior determination *in the same case*.) (citations omitted) (emphasis added).

B. Comparability of the California Convictions to Washington Crimes

To determine if a foreign crime may be included in calculating an offender score, we compare the foreign crime's elements to the Washington criminal statutes in effect when the defendant committed the foreign crime. *State v.*

Morley, 134 Wn.2d 588, 605, 952 P.2d 167 (1998) (citing *State v. Wiley*, 124 Wn.2d 679, 684, 880 P.2d 983 (1994)). If the foreign conviction is comparable to a Washington crime, the sentencing court may count it toward the offender score as if it were the equivalent Washington offense.[4] *Morley*, 134 Wn.2d at 606. If the elements are not identical, then the sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute.[5] *Morley*, 134 Wn.2d at 606 (citing *State v. Duke*, 77 Wn. App. 532, 535, 892 P.2d 120 (1995)). But the elements of the charged crime remain the cornerstone of the comparison because if facts or allegations in the record are not directly related to the charged crime's elements, they may not have been sufficiently proven at trial. *Morley*, 134 Wn.2d at 606.

Hargrave argues that his California convictions are not legally or factually comparable to Washington offenses and that the trial court could not count them because a jury did not determine their existence beyond a reasonable doubt.

When Hargrave committed the California offenses, California law stated that "[e]very person who shall feloniously steal, take, carry, lead, or drive away the personal property of another . . . is guilty of theft." Former Cal. Pen. Code § 484 (1988). At that time, Washington's theft statute provided: "(1) 'Theft' means: (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services." Former RCW 9A.56.020 (1989). While California law provided

[4] Our Supreme Court refers to this as "legal comparability." *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255-56, 111 P.3d 837 (2005).

[5] Our Supreme Court refers to this as "factual comparability." *Lavery*, 154 Wn.2d at 256-57.

that a person committed theft by "feloniously taking," Washington's "wrongfully obtain" is substantially equivalent. Both states require that the thief take the "property of another." *Compare* Former RCW 9A.56.020 (1989) *with* Former Cal. Pen. Code § 484 (1988). While the California statute doesn't expressly require the defendant to have the "intent to deprive [the owner]" of property language of the Washington statute, California courts have long held that "theft . . . requires a specific intent permanently to deprive the rightful owner of his property." *People v. Kunkin*, 9 Cal. 3d 245, 251, 507 P.2d 1392 (1973) (citing *People v. Brown*, 105 Cal. 66, 69, 38 P. 518 (1894)). Thus, California and Washington defined theft in nearly identical terms.

Hargrave committed grand theft in California once in 1991 and once in 1992. The court sentenced him in 1992 and 1993, respectively. At that time, grand theft was a felony under California law. Former Cal. Pen. Code §§ 484; 487; 487.1 (1988). When Hargrave committed his first offense in 1991, California's grand theft statute read, in pertinent part: "Grand theft is theft committed in any of the following cases: 1. When the money, labor or real or personal property is of a value exceeding four hundred dollars ($400)." Former Cal. Pen. Code § 487(1). (1988). And in 1991, Washington's second degree theft statute provided, in relevant part: "(1) A person is guilty of theft in the second degree if he commits theft of: (a) Property or services which exceed(s) two hundred and fifty dollars in value, but does not exceed one thousand five hundred dollars in value. . . ". Former RCW 9A.56.040 (1989).

These two statutes are sufficiently comparable for the trial court to include the California conviction in calculating Hargrave's offender score. Both statutes required the defendant to commit theft, which as discussed above, is a comparable act in both states. More importantly, to commit grand theft in California, Hargrave had

to unlawfully appropriate property exceeding $400 in value, whereas in Washington, the State could charge him for unlawfully taking over $250. Thus, the trial court did not err in including Hargrave's 1992 conviction in calculating his offender score. *See Morley*, 134 Wn.2d at 606.

Hargrave committed a second grand theft in California in 1992. Both states' theft definitions were the same in 1992 as they were in 1991. As discussed above, both states defined theft nearly identically. At that time, California's grand theft statute stated, in relevant part: "Grand theft is theft committed in any of the following cases: . . . 2. When the property is taken from the person of another." Former Cal. Pen. Code § 487 (1988).

In 1992, Washington's first degree theft statute provided, in part: "(1) A person is guilty of theft in the first degree if he commits theft of: . . . (b) Property of any value . . . taken from the person of another (2) Theft in the first degree is a class B felony." Former RCW 9A.56.030(1)(b), (2) (1992).

The statutes are similar except that Washington's included "of any value" whereas the California statute did not. But California courts have held that a person commits grand theft if he takes property of any value from the person of another. *See People v. Morales*, 49 Cal. App. 3d 134, 139 (1975) (taking property from the person of another is grand theft regardless of the value of the property); *People v Herrin*, 82 Cal. App. 2d 795, 796 (1947) (removal of wallet from person of victim constitutes grand theft, and value of property is immaterial). The Washington and California statutes are sufficiently comparable to count the California conviction toward Hargrave's offender score. *See Morley*, 134 Wn.2d at 605-06 (if the foreign conviction is comparable to a Washington crime, it counts toward the offender score as if it were the equivalent Washington offense).

We conclude that the trial court did not

err in counting the California convictions toward Hargrave's offender score for the current offense.

C. Facts Underlying Hargrave's California Convictions

Citing *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255-56, 111 P.3d 837 (2005), Hargrave argues that by including his California convictions in his offender score calculation, the trial court engaged in improper judicial fact-finding. He reasons that in comparing one of his California grand theft convictions to a similar Washington crime, a jury, not the trial court, had to determine if Hargrave unlawfully took property worth over $250.

In *Lavery*, our Supreme Court held that any attempt to examine the underlying facts of a foreign conviction, facts that were not admitted or stipulated to, and not proved to the fact-finder beyond a reasonable doubt, is problematic because the foreign conviction's statutory elements may be broader than those under a similar Washington statute; and if so, the foreign conviction may not be comparable. *Lavery*, 154 Wn.2d at 258.

But Hargrave pleaded guilty to both California grand theft charges. Since Hargrave admitted to the facts underlying both California convictions when he pleaded guilty to them,[6] *Lavery* does not apply. *See Lavery*, 154 Wn.2d at 258.[7]

[6] The information charging the offenses that Hargrave pleaded guilty to for the 1991 offense stated that "[Hargrave] willfully and unlawfully [took] money and personal property of a value exceeding $400; to-wit, tools." XXIV Report of Proceedings (RP) at 413. The language in the information charging Hargrave in the 1992 offense stated that "[Hargrave] did willfully and unlawfully take property from the person of another." XXIV RP at 414.

[7] Furthermore, *Lavery* can also be distinguished because the court relied on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), in holding that the jury needed to find the underlying facts that allowed the court to sentence Lavery to life without parole under the Persistent Offender Accountability Act. Here, *Apprendi* is inapplicable in factually comparing Hargrave's California convictions because they fit within the "prior conviction" exception to the rule that any fact that increases the penalty for a crime beyond the prescribed statutory maximum

The trial court did not err by including Hargrave's 1992 and 1993 California convictions in calculating his offender score.

II. Community Placement Included in Offender Score

Hargrave next argues that the trial court erred by adding one point to his offender score for being on community placement at the time of his current offense. He argues that under *State v. Jones*, 126 Wn. App. 136, 144, 107 P.3d 755, *review granted*, 124 P.3d 659 (2005), a jury, not a judge, must make the factual determination beyond a reasonable doubt whether a defendant was on community placement at the time he commits the offense. But we have recently rejected *Jones* and held that a defendant's community placement status is so closely connected to his criminal history that it falls within *Blakely*'s[8] prior conviction exception to the rule requiring the State to prove sentence—increasing facts to a jury beyond a reasonable doubt. *State v. Giles*, 2006 Wash. App. LEXIS 830, at *9-11 (2006).

III. Prosecutorial Misconduct

The same prosecutor represented the State in *Hargrave I* and in the instant case. Hargrave argues that in urging the sentencing court to include the California convictions in his offender score, the "prosecutor laid aside his duty to seek justice and disregarded this court's ruling [that the State did not meet its burden of providing sufficient evidence to prove the classification of prior out-of-state convictions by a preponderance,] thereby committing misconduct." Supp. Br. of Appellant at 5.

This argument is closely tied to Hargrave's law of the case argument, an argument we have rejected. Because we hold that the sentencing court properly included Hargrave's California

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must be submitted to a jury, and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490.

[8] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

convictions, he cannot show that the prosecutor improperly asked the court to include the convictions.

IV. Ineffective Assistance of Counsel

Hargrave maintains that his counsel should have argued that (1) the California convictions were not comparable to Washington offenses, (2) a jury was required to find, beyond a reasonable doubt, that he was on community placement at the time of his current offense, (3) the "law of the case" doctrine precluded the court from including his California convictions in calculating his offender score, and (4) the prosecutor committed misconduct in again arguing that the court should include the California convictions in calculating Hargrave's offender score. Br. of Appellant at 10.

To prove ineffective assistance of counsel, Hargrave must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005) (citations omitted). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998) (citations omitted).

Hargrave reasons that counsel may have waived the aforementioned issues by failing to argue them below. But Hargrave properly raised the first three arguments for the first time on appeal. *See Call*, 144 Wn.2d at 331-32 (a challenge to an offender score calculation may be raised for the first time on appeal) (citing *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994)).[9] And, we have rejected all of Hargrave's claims on their merits, including the *Blakely* sentencing question. Thus, Hargrave cannot

show that counsel's failure to raise the issues prejudiced him.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

I concur:

Van Deren, A.C.J.

[9] Indeed, Hargrave's appellate brief acknowledges that he included the first two ineffective assistance claims "out of an abundance of caution." Br. of Appellant at 10, n.4.

QUINN-BRINTNALL, C.J. (concurring in the result) — I concur without reservation in sections I, III, and IV of the majority opinion and in the result affirming both William Hargrave's conviction and sentence.

I write separately because I would decline to address Hargrave's challenge to the sentencing court's decision to add one point to his offender score for being on community placement at the time of his current offense.

Hargrave's sentencing judge included one point for committing the offense while on community placement and calculated his offender score at 10. Without the challenged community placement point his offender score would be nine. Hargrave's challenge to his offender score calculation does not alter his "9 or above" standard range. The court imposed a sentence within that range. Thus, I decline to address whether *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) requires that a jury, not a judge, find that a defendant was on community placement at the time he committed these offenses before an additional point may be included in his offender score. But because I would affirm Hargrave's conviction and sentence, on other grounds, I concur in the result.

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QUINN-BRINTNALL, C.J.